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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re V.R. et al., Persons Coming Under the
Juvenile Court Law.

ALAMEDA COUNTY SOCIAL
SERVICES AGENCY,

Plaintiff and Respondent,

v.

R.M.,

Defendant and Appellant.

A145558

(Alameda County
Super. Ct. Nos. OJ14022241,
OJ14022242)

Mother appeals from the termination of her parental rights to her now four-year-old daughter and two-year-old son. She contends the juvenile court abused its discretion by denying her petition for modification (Welf. & Inst. Code, § 388)¹ and by failing to apply the “parental benefit exception” to adoption (§ 366.26, subd. (c)(1)(B)(i)). Mother also contends reversal is required because the court failed to comply with the notice requirements of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). While we reject mother’s arguments that the court erred in terminating her parental rights, we agree that the matter must be conditionally reversed for compliance with ICWA.

Factual and Procedural History

On January 13, 2014, the Alameda County Social Services Agency (the agency) filed a petition under section 300, subdivision (b) alleging that, due to ongoing and severe

¹ All statutory references are to the Welfare and Institutions Code.

substance abuse problems, mother was unable to adequately care for or protect her then two-year-old daughter and five-month-old son. The petition states that mother tested positive for cocaine, heroin and benzodiazepine at her son's birth and that the newborn also tested positive for cocaine. Mother acknowledged ongoing use of crack, heroin and Vicodin throughout her pregnancy. The petition further describes mother's subsequent failure to follow through with numerous referrals to inpatient drug treatment programs and her discharge from outpatient treatment services due to her nonattendance and lack of compliance. Finally, the petition details mother's unwillingness or inability to care for her children. Examples include selling infant formula in order to purchase illegal substances and failing to follow through on needed developmental assessments and therapy services for her daughter. The children were removed from mother's care and placed with their maternal cousin and his partner.

On January 30, 2014, the court declared the children dependents and ordered them to remain with their caregivers based on clear and convincing evidence that the children could not safely return to mother's home. The court ordered reunification services for mother and specifically required that she "enroll in an inpatient substance abuse treatment facility, following detox, due to heroin addiction."

The agency referred mother to the family drug court program and a recovery specialist. Progress reports submitted to the drug court by the recovery specialist state that while mother attended her meetings with the specialist, she had not attended any other required meetings or therapy. Mother had not applied for or entered inpatient treatment and had not attempted the 21-day detoxification as agreed to by mother and the social worker. Mother had positive drug tests on January 27, February 4, February 7, February 11, February 14, February 27, February 28, March 5, March 7, March 11, March 17, and March 24 of 2014, and missed all other drug testing appointments in February, March and April of that year. Mother was discharged from the family drug court program in April 2014.

The agency submitted a report in advance of the six-month review hearing recommending termination of reunification services and the setting of a permanent

placement hearing based on mother's failure to avail herself of any of the numerous treatment opportunities she was provided.

At the contested six-month review hearing on October 16, 2014, the juvenile court terminated family reunification services and set a permanency planning hearing for February 19, 2015.

On February 6, 2015, mother filed a section 388 petition indicating that on January 16, 2015, she entered an inpatient drug treatment program and that she has been testing clean. Her petition requests that the children be placed with her and that reunification services be reinstated. On the same day, the agency filed a section 366.26 report recommending adoption as the children's permanent plan.

A combined hearing on the modification petition and termination of parental rights was held on April 30, 2015. Mother testified that she had visited the children weekly until September 2014. Then she saw them once in December 2014, twice in January 2015 and twice in February 2015. The visits were "good" and when the children see her they smile and try to go to her. She was still on methadone maintenance but was trying to taper down her dosage. She had lived in a "sober living environment" for three months, but left because she could not afford the \$600 monthly fee. She acknowledged that the "sober living environment" was not an inpatient drug treatment program as represented in her section 388 petition. At the time of the hearing she was in an outpatient program but had been accepted into a 90-day drug treatment program. She participated in individual counseling at the methadone maintenance center and was attending parenting classes. She claimed that she had been testing clean, but admitted that she had relapsed once in February 2015 and had used crack cocaine for two or three days.

The court denied the section 388 petition, explaining that there were no changed circumstances that warranted reconsideration of the termination of services. Thereafter, the court terminated parental rights and ordered the children placed with their current caretakers. Mother timely filed a notice of appeal.

Discussion

1. *The Section 388 Petition*

Section 388 provides that “[a]ny parent or other person” may petition the juvenile court to “change, modify, or set aside” any previously made order on grounds of “change of circumstance or new evidence. . . .” The moving party has the burden of showing, by a preponderance of the evidence, both that there are changed circumstances and that these differences “make a change of placement in the best interest of the child.” (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) Section 388 allows a court to change an order when a parent “complete[s] a reformation in the short, final period after the termination of reunification services but before the actual termination of parental rights.” (*In re Kimberly F.* (1996) 56 Cal.App.4th 519, 528.) As our Supreme Court has explained, section 388 is an “escape mechanism” which the Legislature included in the statutory scheme “to accommodate the possibility that circumstances may change after the reunification period that may justify a change in a prior reunification order.” (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) We review the juvenile court’s denial of a section 388 petition for an abuse of discretion. (*In re Stephanie M.*, *supra*, at p. 317.)

In this case, mother failed to demonstrate changed circumstances sufficient to support her section 388 petition or that any change in the court’s prior order would be in the children’s best interest. While she had made attempts to overcome her use of drugs and had plans to continue with those efforts, she had suffered a recent relapse and was not yet in position to safely care for her children. Under the circumstances, a change in placement was not a possibility and the record does not demonstrate that mother’s commitment to treatment warranted the provision of additional reunification services. There was no abuse of discretion in the denial of the petition.

2. *The Beneficial Parental Relationship Exception*

When reunification services have been terminated, as in this case, the focus of the dependency proceeding shifts from preserving the family to promoting the best interest of the child, including the child’s interest in a stable, permanent placement that allows the

caregiver to make a full emotional commitment to the child. (*In re Fernando M.* (2006) 138 Cal.App.4th 529, 534.) At the section 366.26 selection and implementation hearing, the court has three options: (1) terminate parental rights and order adoption as the permanent plan, (2) appoint a legal guardian for the dependent child, or (3) order the child placed in long-term foster care. (*Ibid.*) “Adoption . . . is the permanent plan preferred by the Legislature.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.) Thus, “[i]f the child is adoptable, there is a strong preference for adoption over alternative permanency plans.” (*In re Michael G.* (2012) 203 Cal.App.4th 580, 588.)

Section 366.26, subdivision (c)(1)(B)(i) provides an exception to the adoption preference if the court finds a “compelling reason” for determining that termination of parental rights would be “detrimental” to the child because the “parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” The statutory phrase “benefit from continuing the relationship” has been interpreted to mean that the parent-child relationship “promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.” (*In re Autumn H., supra*, 27 Cal.App.4th at p. 575.) In determining whether the child would benefit from continuing the parent-child relationship for purposes of this exception, the court “balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated.” (*Ibid.*) To meet the burden of establishing the applicability of the beneficial parent-child relationship exception, a parent must show more than frequent and loving contact, an emotional bond with the child, or pleasant visits. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827.)

Mother does not challenge the sufficiency of the evidence that the children are adoptable. She argues, however, that “[t]he failure by the juvenile court to apply the

statutory exception to termination of parental rights based on the mother's relationship to the children requires reversal of the order terminating her parental rights." We disagree.

Mother did not maintain regular visitation with the children. The record establishes that between January 2014 when the children were removed from her care and the hearing in April 2015, mother was offered regular visitation. However, she frequently arrived late or failed to attend scheduled visits. Her testimony confirms that in the months leading up to the hearing, her visitation was sporadic at best. Nor was there evidence that mother occupied a parental role in the children's lives. (*In re C.F.* (2011) 193 Cal.App.4th 549, 555 [to satisfy exception "parent must show he or she occupies a parental role in the child's life."]) Her son was a newborn and her daughter was two years old when they were removed from mother's care. Thus, they had been raised for most of their lives by their current caregivers. The social worker's report established that while the visits with mother generally went well, the children looked to their caregivers to fulfill their parenting needs. We find no error in the termination of parental rights.

3. ICWA

"The ICWA provides that 'where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention.' [Citation.] If the tribe is unknown, the notice must be given to the Bureau of Indian Affairs [BIA] as the agent for the Secretary of the Interior." (*In re Daniel M.* (2003) 110 Cal.App.4th 703, 707.) "Notice under the ICWA must, of course, contain enough information to constitute meaningful notice. The Guidelines for State Courts; Indian Child Custody Proceedings . . . (Guidelines), which are designed to implement the ICWA, require that the notice include, among other things, the name of the Indian child; his or her tribal affiliation; a copy of the dependency petition; the petitioner's name and address of the petitioner's attorney; and a statement of the right of the tribe to intervene in the proceedings." (*In re Karla C.* (2003) 113

Cal.App.4th 166, 175.) “Additionally, by federal regulation an ICWA notice must include, if known, (1) the name, birthplace, and birth date of the Indian child; (2) the name of the tribe in which the Indian child is enrolled or may be eligible for enrollment; (3) names and addresses of the child's parents, grandparents, great-grandparents and other identifying information; and (4) a copy of the dependency petition. [Citations.] ‘[T]o establish tribal identity, it is necessary to provide as much information as is known on the Indian child's direct lineal ancestors.’ ” (*Id.* at p. 175; § 224.2 [Notice shall include “All names known of the Indian child's biological parents, grandparents, and great-grandparents, or Indian custodians, including maiden, married and former names or aliases, as well as their current and former addresses, birthdates, places of birth and death, tribal enrollment numbers, and any other identifying information, if known.”].)

In this case, the petition states that neither child has any known Indian ancestry and prior to the detention hearing the social worker explained in her detention report that both parents had told her “that neither they nor their children have Native American Heritage.” The minute order from the detention hearing reflects that the parents “were sworn under oath and voir dired as to paternity and ICWA” then instructed to complete a “Parental Notification of Indian Status” form and “submit it to the court before leaving the courtroom today unless that form was previously submitted.” Although the forms are not in the record, the July 2014 status report states that both parents completed and submitted a Parental Notification of Indian Status form indicating that there was no Indian ancestry. The report requests the court make a finding that ICWA does not apply. The July status review hearing was continued until October for a contested hearing on the termination of reunification services.

On the same day as the October hearing, father filed a Parental Notification of Indian Status form claiming that his maternal and paternal grandmothers were members of a tribe. He listed their names but indicated that he did not know to which tribe they belonged. The minute order from the October hearing indicates that the ICWA determination for father was deferred. On December 17, 2014, the social worker sent notice of the proceedings to the Shinnecock Indian Nation, the Bureau of Indian Affairs

and the Secretary of the Interior. The notice listed the children's names, the parent's names, the dates and places of birth for the children, the dates and location of birth (California) for the parents. The notice also contains the names of the two relatives identified by father, but mistakenly lists them as the children's paternal grandmothers rather than their paternal great-grandmothers. For all the other requested information the social worker wrote either "unknown" or "No information available." Copies of the notices were submitted to the court in advance of the section 366.26 hearing. As the agency acknowledges, the court did not make an express determination as to the applicability of ICWA at the hearing or in its order terminating parental rights.

Mother faults the court and the agency for failing to conduct an adequate investigation into father's relatives and potentially relevant tribes. The agency argues it and the court met their ICWA burden: "First, the court properly ordered the parents to complete an ICWA 020 at their first appearance in the dependency case in accordance with California Rule of Court, rule 5.481. Similarly, the agency interviewed the parents regarding their possible Indian heritage and submitted the proper documentation to the court. While the social services agency has a duty of inquiry under California law, it does not have a duty to conduct an extensive independent investigation for information. Moreover, none of the other parties or their representatives who shared in this duty of inquiry brought forward information in a timely manner. As the party with superior access to information regarding possible Indian ancestry, it was [father's] duty (with the assistance of his counsel) to present this information to the court in a timely manner on the appropriate Judicial Council form. The court and agency did everything required by law to determine the ICWA status of the children."

While the agency does not have an obligation to conduct an extensive investigation, it is clear that had father submitted the same notice form at the beginning of the proceedings, the agency would have had to do more than it did in this case to satisfy ICWA. (*In re D.T.* (2003) 113 Cal.App.4th 1449, 1455 ["[S]ocial worker's affirmative duty to inquire whether the minors might be Indian children mandated, at a minimum, that she make some inquiry regarding the additional information required to be included

in the ICWA notice.”]; *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 705 [notice was insufficient where “mother and father were participating in the proceedings and may have been available to provide information about their birthplaces, as well as the birthplace of [the child], and it would appear [the agency] made little effort to provide the tribe with sufficient information for a thorough examination of tribal records.”]; Cal. Rules of Court, rule 5.481(a)(4) [social worker “must make further inquiry as soon as practicable by: [¶] (A) Interviewing the parents . . . and ‘extended family members’ . . . to gather the information listed in . . . section 224.2(a)(5)” including the names known of the child’s biological parents, grandparents, and great-grandparents, as well as their current and former addresses, birthdates, places of birth and death and any other identifying information, if known.] Contrary to the agency’s argument, father’s delay in submitting the form does not excuse the social worker’s failure to conduct even minimal investigation or follow-up inquiry to obtain and include in the notice the information which is called for in the notice, such as the city or county of the father’s birth and identifying information about his relatives, all of which information may help the Bureau of Indian Affairs and other recipients of the notice determine the children’s possible Indian ancestry. (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1424 [“Notice is mandatory, regardless of how late in the proceedings a child’s possible Indian heritage is uncovered.”].) While father’s lack of credibility might have supported a finding that ICWA did not apply (see *In re N.M.* (2008) 161 Cal.App.4th 253, 261-262, 267 [notice not required where juvenile court found the mother’s claims of tribal affiliation not credible]), the court did not make a finding as to the credibility of father’s claimed ancestry and instead deferred its ICWA determination, presumably until notice was given. Finally, after deferring the ICWA determination, the court failed to make a final determination at the section 366.26 hearing. Given the state of the record, it is not clear that such a finding can be implied in this case. (*In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1413 [“[J]uvenile courts should make an explicit rather than implicit determination as to the applicability of the ICWA.”].) Because the court and agency had reason to know the children may be Indian children but failed to conduct any inquiry and

provide adequate notice, the matter must be remanded to the juvenile court with directions to ensure ICWA compliance.

Disposition

The order terminating parental rights is conditionally reversed, and the cause is remanded to the dependency court with directions to conduct such further proceedings as are necessary to establish full compliance with the notice requirements of the ICWA. If the court determines that ICWA does not apply, the order terminating parental rights shall be immediately reinstated and such further proceedings as are appropriate shall be conducted. If it is determined that ICWA applies, the dependency court shall proceed accordingly. In all other respects, the order is affirmed.

Pollak, J.

We concur:

McGuinness, P. J.

Siggins, J.